STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2003
v	No. 235854 Oakland Circuit Court
DIANE KAY DAVIS, Defendant-Appellant.	LC No. 2000-175487-FH

Before: Saad, P.J., and Zahra, and Schuette JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction for fourth-degree child abuse, MCL 750.136b(6). Defendant was sentenced to one-year probation. We affirm.

I. Facts and Procedure

Defendant is the victim's mother. When the victim was younger her eardrum burst and she had tubes surgically inserted in her ears. The victim had recurrent problems throughout her childhood with her ears and defendant was aware of the victim's ear vulnerability and sensitivity. At the time of the incident the victim was twelve years old.

On September 21, 2000, defendant received a letter from her ex-husband, the victim's father, stating that the victim was seeing a therapist. Defendant became very angry with the victim. On September 22, 2000, defendant, still angry, started yelling at the victim and struck her in the ear. The victim fell to the ground and defendant continued striking her across the arms and legs. After the incident, the victim walked to school and informed her school counselor that defendant had struck her in the ear, and complained of poor hearing. The school counselor reported the incident to protective services. The victim was examined at the hospital and an ER doctor determined that her eardrum had ruptured. The ER doctor noticed fresh blood within the victim's ear and a small red inflammation near the victim's kneecap. Both the ER physician and the victim's follow up ENT physician concluded that the injury could have been attributed to defendant's striking of the victim.

Defendant was originally charged with third-degree child abuse. Defense counsel wanted to use a trial strategy that involved invoking the parental discipline privilege, which allows a parent to use reasonable corporal punishment on a child. Consequently, a pretrial motion was filed to request a jury instruction on specific intent. The trial court ruled that this Court's

conclusion in *People v Sherman-Huffman*, 241 Mich App 264; 615 NW2d 776 (2000), aff'd 466 Mich 39; __ NW2d __ (2002), that third-degree child abuse is a specific intent crime was dictum that was not binding on the trial court. Defendant's motion was denied.

II. Analysis

Defendant's first issue on appeal is that the trial court erred in refusing to instruct the jury that the offense of third-degree child abuse is a specific intent crime. We conclude that even if third-degree child abuse is a specific intent crime, the instructional error alleged by defendant was harmless.

Defendant in a motion in limine relied on *Sherman-Huffman, supra*, to support her request that a specific intent instruction be given to the jury as an element of third-degree child abuse. The trial court denied the request holding, that the ruling in *Sherman-Huffman, supra*, relied upon dicta stated in *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997), and therefore, was not binding on the trial court. "It is a well-settled rule that obiter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis. *People v Forchard-Ruthland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999), see also *Roberts v Auto-Owners Inc Co*, 422 Mich 594, 596; 374 NW2d 905 (1985).

The trial court's assessment of *Sherman-Huffman* was correct. The Supreme Court granted leave in *Sherman-Huffman* to consider whether third-degree child abuse is a specific or general intent crime. The Supreme Court determined, however, that there was sufficient evidence to sustain defendant's conviction for third-degree child abuse regardless of whether the statute requires general or specific intent. In so holding, the Supreme Court noted that "[t]he statement by the Court of Appeals that third-degree child abuse is a specific intent crime is dictum, in light of [The Supreme Court's] finding that there was sufficient evidence to support defendant's conviction under either standard." *Sherman-Huffman, supra* 466 Mich at 40 n 2.

Like the Supreme Court in *Sherman-Huffman*, we too conclude in the present case that we need not determine whether the third-degree child abuse statute requires general or specific intent. Even if third-degree child abuse is a specific intent crime, any instructional error in this case was harmless. A jury instruction that erroneously instructs the jury regarding an essential element of a criminal offense is reviewed for harmless error. *People v Vaughn*, 447 Mich 217, 235; 524 NW2d 217 (1994). Because the present case concerns a preserved nonconstitutional error, the defendant has the burden of establishing a miscarriage of justice under a "more probable than not standard." *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). "[T]he analysis focuses on whether the error undermined reliability in the verdict." *People v Cornell*, 466 Mich 335, 364; 646 NW2d 127 (2002).

Defendant has not sustained her burden of showing that it was more probable than not that the failure to provide the requested instruction undermined the reliability of the verdict. Defendant was charged with third-degree child abuse, but convicted of the lesser included offense of fourth-degree child abuse. Third-degree child abuse requires that a person "knowingly or intentionally" cause physical harm to a child, whereas fourth-degree child abuse only requires that a person's "omission or reckless act" cause physical harm to a child. See MCL 750.136b(5) and (6). Accordingly, defendant has not shown that the omission of the specific

intent instruction regarding third-degree child abuse undermined the reliability of the verdict, which lacked the "knowingly or intentionally" element.

Defendant's second issue on appeal is that by omitting requirements of intent, the trial court forced the jury to compromise its verdict on a lesser included offense. We disagree.

Jury instructions are reviewed as a whole rather than extracted piecemeal in an effort to establish error. *People v Dumas,* 454 Mich 390, 396; 563 NW2d 31 (1997); *People v Wolford,* 189 Mich App 478, 481; 473 NW2d 767 (1991). Even if somewhat imperfect, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Dumas, supra,* 454 Mich 396; *Wolford, supra,* 189 Mich App 481.

Defendant argues that our Supreme Court's decision in *People v Graves,* 458 Mich 476; 581 NW2d 229 (1998), which addresses the issue of compromise verdicts, warrants reversal of defendant's conviction in this case. We disagree. *Graves, supra,* deals with situations where there is insufficient evidence presented to support a charge, and consequently, error occurs in the form of a compromise verdict after submitting the unwarranted charge to a jury. *Graves, supra,* 458 Mich 487-488. In the present case, there was sufficient evidence to submit the charge of third-degree child abuse,[1] although defendant was only convicted of fourth-degree child abuse.

Defendant knew that the victim had a medical history involving ear problems including eardrum ruptures. Multiple doctors testified that defendant was aware of the victim's ear problems and sensitivity. The victim testified that defendant was angry with the victim and struck her in the ear. Defendant's husband testified that defendant was distraught and upset the morning that defendant hit the victim. The victim was examined at the hospital and it was determined that her eardrum had ruptured. Both the ER physician and the victim's follow up ENT attributed the ruptured ear drum to a barrow trauma caused when air is forced down into the ear canal, which was consistent with the victim being struck in the ear. Consequently, we conclude there was sufficient evidence presented in this case to submit the charge of third-degree child abuse to the jury, although defendant was only convicted of fourth-degree child abuse.

Defendant's last issue on appeal is that the trial court's failure to define the term "reckless" for the jury requires reversal. This issue is waived on appeal. Defendant expressed satisfaction with the jury instructions regarding fourth-degree child abuse. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Carines,* 460 Mich 750, 762-763; 597 NW2d 130 (1999). This approval extinguished any error, and thus, precludes appellate review of a claimed deprivation of those rights. *Carter, supra,* 462 Mich 215-216.

III. Conclusion

Even if we assume error stemming from the trial court's refusal to give a specific intent instruction regarding third-degree child abuse, any such error was harmless because the failure to give the requested instruction did not undermine the reliability of the verdict. Additionally, the

[1] We shall assume for purposes of analyzing this issue that the prosecution was required to establish specific intent.

omission of the intent requirement did not result in a compromise verdict because sufficient evidence existed to submit the charge of third-degree child abuse to the jury, although defendant was only convicted of fourth-degree child abuse. Last, the trial court's failure to define the term "reckless" for the jury is an issue waived on appeal due to defendant's expressed satisfaction with the jury instructions regarding fourth-degree child abuse.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette